Pamphlet 3

US Army Corps of Engineers

ALTERNATIVE DISPUTE RESOLUTION SERIES

(2)

MEDIATION

September 1991

IWR Pamphlet-91-ADR-P-3

The Corps Commitment to Alternative Dispute Resolution (ADR):

This pamphlet is one in a series of pamphlets describing applications of Alternative Dispute Resolution (ADR). The pamphlet is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These pamphlets are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in this pamphlet is designed to stimulate innovation by Corps managers in the use of ADR techniques.

These pamphlets are produced under the proponency of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel; and the guidance of the U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager.

For further information on the ADR Program and pamphlet contact Program Manager:

Dr. Jerome Delli Priscoli
Institute for Water Resources
Casey Building
Ft. Belvoir, VA 22060-5586
Telephone: (703) 355-2372
Fax: (703) 355-3171

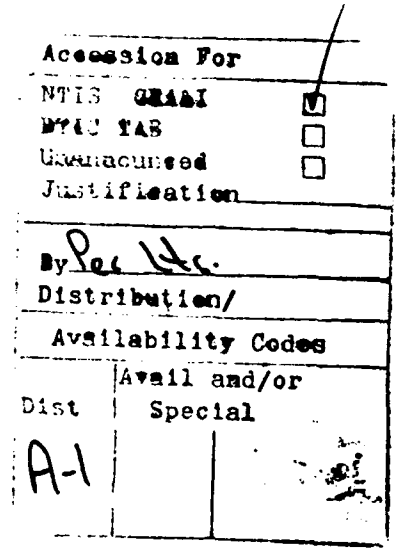
MEDIATION

Alternative Dispute Resolution Series

Pamphlet #3

WRITTEN by:

Christopher W. Moore, Ph.D.
Partner
CDR Associates
Boulder, Colorado



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This pamphlet describes mediation, one of a number of alternative dispute resolution (ADR) techniques which the U.S. Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation. The pamphlet describes what the technique is, how it has been used, and provides guidance on how to participate in the mediation process.

MEDIATION

What is Mediation?

Mediation is a dispute resolution process in which a neutral and impartial third party assists the people in conflict to negotiate an acceptable settlement of contested issues. Mediation is frequently used to avoid or overcome an impasse when parties have been unable to negotiate an agreement on their own.

Most disputes are resolved by informal conversations, some form of cooperative problem solving, or negotiation. Involved parties reach an acceptable settlement of their differences through direct unassisted interaction. But not all conflicts can be resolved in this manner.

Some conflicts—which involve strong emotions, significant differences in the ways that data is interpreted, perceived or actual conflicts of interest or extreme bargaining positions—result in impasse. The parties are deadlocked and are either unable to start negotiations, or where negotiations have been initiated, they are stalled and no progress is possible. In conflicts characterized by the above conditions, the parties may need the assistance of a third party to reach an acceptable negotiated settlement. Mediation is one of the major procedures which can be used to aid parties in the resolution of intractable disputes.

Mediation is familiar to most people as a means of resolving labor-management and international disputes, but it also has been used to settle contract, interpersonal, personnel, EEO, operational, site specific and policy conflicts. Mediation involves the intervention of a third person, or mediator, into a dispute or negotiation to assist the parties to voluntarily negotiate a jointly acceptable resolution of issues in conflict. The mediator is neutral in that he or she does not stand to personally benefit from the terms of the settlement, and impartial in that he or she does not have a preconceived bias about how the conflict should be resolved.

The mediator is asked by the disputing parties to assist them to voluntarily reach an agreement. The mediator has no decision-making authority and cannot impose a decision.

- The mediator may assist the parties to handle strong emotions, misperceptions, stereotypes, or miscommunication by listening and legitimizing (but not necessarily agreeing with) feelings, clarifying communications, summarizing statements, and proposing more effective communication structures.

- The mediator will ask the parties to jointly discuss each of the issues, and to identify the various interests or needs to be satisfied. Mediators will usually reframe or define issues to be addressed in terms of meeting the parties' joint interests.

- Many disputes are caused by the inability of a team or organization to reach internal agreements on a negotiation strategy or acceptable settlement options. Mediators often assist a team or spokesperson to build an internal consensus or approach to negotiations.

- The mediator will assist the parties to back off of extreme or hard line positions, preferred solutions which are advocated by each of the parties; and to generate alternative settlement options. Option generation may occur either in joint meetings or in separate caucuses where the mediator meets in private with each of the parties.

- Impasse commonly occurs because parties dislike and dismiss options on the negotiation table, but fail to assess the benefits and costs of alternative resolution procedure and potential outcomes that may result from their use. Mediators often help parties to evaluate the merits of settlement by means of negotiations in contrast to non-negotiated alternatives.

- The mediator helps prepare the parties to make "yesable" proposals that will be more acceptable or readily agreed to by the other party or parties. They do this by assisting parties to make offers which meet both their own and others' interests, and by improving the form or manner in which offers are communicated.

- As parties make offers, the mediator may translate or interpret them to the other side. He or she may do this by "shuttle mediation," where the mediator travels between private meetings with the parties; or directly in a joint session.

- The mediator assists parties to identify and define areas of agreement by "testing" for consensus. The mediator listens for and restates common or overlapping views. Since parties in dispute often talk past an agreement, the mediators' assistance is often invaluable in identifying areas of agreement.

- As the parties reach agreements, the mediator may act as a scribe who captures the settlement in a Memorandum of Understanding (MOU). This MOU, where appropriate, may later be drafted in the form of a contract or other legal document.

In conclusion, mediation is:

- **Voluntary**

No party is forced to use a mediator nor are they forced to agree to a particular settlement. The agreement to use the process and any settlement which results is voluntary. The mediator does not decide for the parties; she or he helps them to make their own decision.

- **Enhanced Negotiation**

  Mediation involves negotiation plus the assistance of a neutral and impartial third party who is dedicated to helping the parties reach a fair, just, and mutually acceptable settlement. The mediator provides specialized relationship building and procedural assistance which enables the parties to negotiate their own agreements more efficiently and effectively.

- **Non-Judicial**

  Decisions are made by the parties themselves. No judges are present in this process. The mediator provides relationship-building and procedural assistance, and may also help to develop new substantive options, but he or she never decides for the parties.

- **Informal**

  The parties, in cooperation with the mediator, have direct control over the proceedings. They can utilize a variety of procedures to identify issues, explore interests and generate creative settlement options. They can also address a wider range of issues than is possible under normal legal proceedings.

- **Confidential**

  The parties and the mediator can jointly establish the limits of confidentiality for mediated negotiations. Mediated negotiations can be treated as settlement conferences where information revealed or settlement options which are explored cannot be used in any later court action. This level of confidentiality allows parties to explore possible areas of agreement while protecting future procedural options.

- **Expedited**

  Mediated negotiations, because of their informal nature and flexible process, are often a more rapid means of reaching agreement. Mediation conferences may be scheduled in a matter of days or weeks depending upon the needs of the parties.

Why Use Mediation?

What are the advantages of using mediation over other means of resolving disputes, such as litigation or formal administrative procedures? There are a number of advantages:

- **Protection of the Relationship**

  In a significant number of conflicts, the parties have or will have an ongoing relationship. Adversarial or win/lose forms of dispute resolution often result in damaged relationships which may preclude the parties working together in the future. Mediation generally results in a settlement that both parties can accept and support, promotes better communications between them, and encourages a respectful and cooperative relationship.

- **Time Savings**

  Mediation assistance is generally available on short notice. The speed and schedule of settlement is entirely dependent on the parties' willingness to address and reach agreement on the issues.

- **Cost Savings**

  Mediation involves direct negotiations between the parties. While legal advisors may be present and offer assistance, key managers are the decision makers and are usually the main actors. This means that legal costs are generally lower in the mediation process. Also, since the parties share the cost of hiring the mediator, the expense is kept down.

- **Greater Flexibility in Possible Settlements**

  Traditional litigation or administrative procedures are generally constrained as to the range of possible settlement options by the law or contract limitations. This means that the types of issues which can be raised or addressed by the parties is often rather narrow. Structural constraints often force parties to address "relationship" or "personality" issues, or issues not covered under the contract, indirectly using an unsuitable forum or procedure. Mediation, because of its more flexible format and lack of structural constraints, allows the parties to address relationship, procedural and substantive issues. It allows people to get to the "root of the problem" without having to "force-fit" a problem into an inappropriate process. Mediation also allows parties to develop customized creative solutions which are tailored to meet specific concerns or interests.

- **Keeps the Decision-Making Authority in the Hands of the Parties**

  Procedures such as litigation, administrative hearings and binding arbitration, rely on third party decision makers to break deadlocks and render a decision. These procedures remove decision-making authority and responsibility from the parties who often are the most informed about the issues and options. Mediation keeps the decision-making authority with the people who best know the problems and it preserves both individual and organizational authority.

Concerns Expressed About Mediation

People who are considering using mediation often have concerns about the impact of the process and the appropriateness of using it in certain cases.

Listed below are some of the most frequently raised questions and some responses.

- ***Doesn't the manager lose control and have his or her authority undermined by using mediation?***

  On the contrary, mediation keeps decision-making authority in the hands of the key parties. Litigation, administrative processes and arbitration remove the authority to decide. In mediation, the parties evaluate whether settlement options developed through negotiations meet their needs, and can reject them if they are unacceptable. Agreement is voluntary and authority is preserved.

- ***Doesn't Mediation Just Result in a Compromise?***

  Occasionally settlements arrived at through mediation are compromises, but often they are more creative and customized agreements which meet the specific needs of the involved parties. Mediated settlements are generally more creative solutions to problems than would be developed through the use of other more adversarial procedures. Mediation helps parties to "expand the pie," negotiate over a broader range of issues, create more comprehensive settlements, alternate satisfaction of interests, trade items that are valued differently and develop elegant "win/win" solutions.

- ***Where Can a Manager find a Competent and Experienced Mediator?***

  Mediators practice in all 50 states and in many foreign countries. Many of them specialize in resolving particular kinds of disputes—contracts, personnel, EEO, organizational, environmental, and public policy. The Institute for Water Resources of the U.S. Army Corps of Engineers, maintains a roster of professional mediators familiar with Corps-related issues. They will be glad to assist managers in finding an appropriate third party. Call (703) 355-2372 for more information. The Administrative Conference of the United States also maintains a roster of neutrals (mediators, arbitrators, etc.). They can be reached at (202) 254-7020.

- ***How Can a Manager be Assured that a Mediator will Remain Impartial and Not Take Sides?***

  Professional mediators are trained not to take sides. Standard practice and the Code of Ethics of the Society of Professionals in Dispute Resolution (SPIDR) guide mediators to assure impartial behavior. Besides, if any of the parties are not satisfied with the mediator's performance or feel that the intervenor is acting in a partial

manner, they may dismiss him or her without question. The mediator serves at the pleasure of the parties.

- ***Won't a Request for Mediation be Perceived as an Indication of a Weak Case?***

  A request for mediation indicates a desire to create a better solution which does not result in a win/lose outcome. Rather than a sign of weakness, initiation of mediation may be an indicator that both parties' interests need to be taken into consideration.

  Also by making the use of assisted negotiations a common practice, the parties can remove any suggestion that mediation indicates weakness on any particular case.

- ***Doesn't mediation imply a sacrifice of principles?***

  If the goal of settling a dispute is to establish a principle or create a legal precedent, mediation may not be the best process to use. But relatively few cases involve issues of principle. Most cases allow for some give and take in the satisfaction of the parties' interests. Also, most cases have some "right" on both sides. Parties will often do well to focus on meeting interests and to avoid issues of who was right and who was wrong.

MEDIATION IN PRACTICE

General Experience with Mediation

Mediation has a long history in all cultures and among all peoples. Mediation has been used extensively in U.S. history to resolve domestic, organizational, commercial and international disputes. Both the private sector and a number of governmental agencies have used mediation to resolve difficult issues.

In the last decade the arenas where mediation has been practiced have grown tremendously. Mediation has been successfully applied to family, community, personnel, EEO, commercial, contractual, organizational, environmental and public policy disputes.

The Corps' Experience with Mediation

The Corps of Engineers has used mediation to resolve a variety of types of public policy, operations and contract disputes. Two examples are described below.

- **Truman Dam and Reservoir—A hydro power generation and natural resource conservation mediation.**

Conflicts over the operation of dams and reservoirs and their impacts on downstream land use and ecology have increased dramatically over the last few years. Across the country, downstream and conservation groups have locked horns with hydro-power and development interests over quantities and timing of releases, number of operating hydro units, bank erosion, impacts on property values, costs of power, recreational opportunities, boating safety and impacts on fisheries.

Facility operators, such as the Corps of Engineers, often find themselves in the middle between parties with entrenched positions and antagonistic relations. Such was the case with Harry S. Truman Reservoir, the largest flood control lake in Missouri with a storage capacity of more than 5 million acre feet of water. This important reservoir is only slightly smaller than the adjoining Lake of the Ozarks, one of the premier recreation areas in the mid-west. In March of 1990, the Corps of Engineers, with mediation assistance, settled a long-term intractable dispute over the operation of Truman Dam and Reservoir.

Truman Dam and Reservoir, originally named the Kaysinger Bluff Dam and Reservoir, had been the subject of controversy ever since it was authorized by the Flood Control Act of 1954. The design of the facility was controversial due to the number of generation units which were authorized (six); the proposed use of a pumpback feature in which water released to run hydro units during peak demand is later pumped back into the reservoir for re-use at a future time; and impacts on downstream property owners. The conflict escalated in 1982, when the pumpback feature was tested and resulted in the loss of an estimated 2,000 pounds of fish which were drawn into the pumps and killed. The State of Missouri took action to limit the use of pumpback and power production, and the power marketer, Southwestern Power Administration, took measures to assure that the authorized level of power generation could be guaranteed. A lengthy public relations battle ensued. Ultimately the Congressional delegations of Missouri and adjoining states became involved because of concerns over environmental and electrical rate issues, and disagreements over the right of one state to take actions which would impose unacceptable financial impacts on the citizens of other states. Several attempts were made to settle the dispute through unassisted negotiations and a public involvement process, but none of these procedures resolved the intractable conflict.

By 1988, the parties still were deadlocked. At this point the Corps decided to initiate mediation as a way to build some trust and take a new look at the options. The Corps contracted with a mediation firm to act as the impartial intervenor. With the assistance of the mediator, the parties identified the outstanding issues and interests to be addressed and designed a jointly acceptable negotiation process. Keys to the success of the early phases of the process were narrowing the number of parties to be involved in the negotiations (State of Missouri Departments of Natural Resources and Conservation, Southwestern Power Administration, Associated Electric Cooperatives, Inc., and the Corps); the designation of lead negotiators who had the authority to settle; and the opportunity to build trust and establish a positive working relationship through informal social time prior to formal negotiations. The mediator provided a structure for the parties to informally identify and discuss the key interests

to be addressed, and where relevant information could be exchanged. This process led to an early breakthrough on issues related to the timing of releases for hydropower generation and during fish spawning periods.

Subsequent meetings and the use of a "single-text" negotiating document, a draft text prepared by the mediator that could be modified by the parties, led to a final agreement on the number of units to be used for power generation and the procedure to be used to test the pumpback feature. After four negotiation sessions, the parties were able to arrive at an agreement on all issues in dispute. Congressional briefings on the settlement, and a public meeting which was attended by a surprisingly small number of citizens, confirmed the general acceptability of the resolution. The final agreement was approved by the Assistant Secretary of the Army on March 8, 1990.

- **Brutoco: A Mediated Contract Claims Settlement**

The Corps has also used mediation to settle contracts disputes. In 1990, Brutoco Engineering and Construction Inc. sued the Corps of Engineers over quantity calculations, a variety of outstanding claims and interest payments related to the Construction of Phase II of the San Ramon Bypass in California. The total claim amounted to approximately $3 million.

The Sacramento District counsel determined that while the District could initially deny all liability, it was probable that the claim would have to be settled through by negotiations or go to litigation at a later time. It was also projected that the case would be difficult and drawn out if it followed the standard litigation process, namely submission to the Contracting Officer and trial before a Board of Contract Appeals. As an alternative method of resolving the dispute, the District chose to pursue a structured mediation process with an advisory component to settle the case. In essence, this model was a mediated "Mini-Trial" in which the third party would be expected to provide both procedural and substantive expertise.

In this mediation, the government was represented by the Contracting Officer, the Chief of Construction Operations Branch, an auditor and an attorney. Brutoco was represented by private council.

Before the date of the mediation conference, both parties submitted a short brief outlining their case to each other and the mediator. On the day of the mediation, each party was given a one-hour time limit to present their case to the mediator and the opposing party. The mediator then met separately with each of the parties to explore whether there was a positive settlement range and to act as a "devil's advocate" in the assessment of each party's case. At the conclusion of the private meetings, the mediator met with the parties in joint session and discussed with them the strengths and weaknesses of each of the parties positions. He also talked about a reasonable settlement figure which was based upon his experience in such cases. The parties subsequently used the information presented by the mediator to negotiate an acceptable settlement. During the final phase of negotiations the mediator

shuttled from room to room, relaying offers and counter offers and helping the parties to assess what their best and most likely alternatives to a negotiated settlement might be. The final resolution, a payment by the Corps of $1,155,700, settled all outstanding issues. A post mediation poll of all Corps participants indicated a high degree of satisfaction with the process and the settlement.

INITIATING AND PARTICIPATING IN MEDIATION

How do you initiate and plan for participation in mediation? This section provides guidance on the specifics of preparing for mediation.

The basic steps of initiating and planning for participation in mediation are as follows:

1) Determine whether or not a mediation procedure may assist the parties to resolve a particular dispute.

2) Obtain any needed management commitments to participate in the process.

3) Approach other parties and gain their agreement to participate, or approach a mediator or mediation organization and request that the intermediary discuss with the other party or parties the option of mediation.

4) Identify the key individuals or groups that should participate in the mediation process for a settlement to be reached.

5) Select an acceptable mediator. The parties should identify the expertise that they want the third party to provide, and then jointly select an acceptable third party or ask a reputable mediation or referral agency to appoint one.

6) Prepare for the mediation by clearly identifying facts to be presented, issues to be discussed, interests that must be met and potential settlement options. Parties should also assess their best alternative to a negotiated agreement.

7) Discuss with the mediator and all parties the format, ground rules and process that will be used in the mediation session or sessions. Agreements should be reached on the above points before proceeding.

8) Conduct the mediation session or sessions.

9) Document any agreement reached.

Further information on several of these steps is provided below:

When is Mediation Appropriate?

The key criteria for the appropriateness of mediation is the parties' willingness to participate in the process. Generally, prior to the initiation of mediation, one or more parties will evaluate internally, or possibly with the other party or parties, to determine if the mediation process is the appropriate means for resolving a conflict. Mediation may be appropriate when:

- Parties have tried to initiate negotiations but have been unable to reach agreement on how to begin discussions. In this instance the mediator may play a "convening" role and will help the parties design an acceptable negotiation process. In large public disputes, the mediator may also play a role in identifying the potential parties that should be involved in the mediation process.

- Parties are having difficulties negotiating because of lack of process, poor process, the wrong process or the right process being used in an inefficient manner. The mediator can help by clarifying productive steps for problem solving or by providing a new process for negotiations.

- Parties have engaged in negotiations and have reached an impasse. Mediators are often able to assist parties to break a deadlock by providing procedural assistance, helping to overcome psychological barriers to settlement, suggesting new and creative option generation procedures or identifying potential trade-offs or packages.

- When there are strong psychological or relationship barriers to negotiating a resolution. Mediators can play an intermediary and conciliatory role between the parties. Mediators are trained to handle emotional barriers to settlement, problems of mis-perception, or poor communications.

- When parties will not, or are reluctant to meet face-to-face. Mediators can engage in "shuttle diplomacy" carrying messages between the parties and helping them to build an agreement.

- When a matter of legal principle is not involved and the parties do not want to create a legal precedent.

- When each of the parties believes that it has some flexibility in its position and a negotiated settlement with the assistance of a mediator is either more efficient, timely, cost effective or psychologically satisfying than a third party decision by a judge or administrative tribunal.

- When the preservation of a working relationship is important. Many conflicts develop in the context of an ongoing relationship. A negotiated agreement to a dispute is often preferable to a command decision because the parties maintain control of the outcome and "own" the decision. The mediation process often repairs or builds new working relationships that are critical to the success of ongoing work.

Are there circumstances where mediation is not appropriate? Generally, cases where one or more parties is acting in bad faith, information necessary for a fair and informed settlement is being withheld or distorted, one or more parties want to lay blame on another or want their "day in court," or where a legal precedent is desirable are not appropriate for mediation.

Who Proposes Mediation?

Any party involved in a dispute may propose mediation as a means to reach a settlement. One party may contact another and propose the process, or a party may contact a mediator or mediation firm and request that the intermediary act in their behalf and contact the other parties.

Earlier a question was raised about how parties can propose mediation without being perceived as weak or having a case lacking in merit. Several approaches can be used to avoid this perception. First, the initiating party can inform the other side, either directly or through an intermediary, that they would like to attempt one last good-faith effort at negotiating a settlement prior to moving to a more adversarial process. The party should also inform the other party that they are preparing to go to an administrative hearing or trial at the same time that they are mediating, so that if mediation fails, no time or advantage for legal action will be lost. This approach clarifies willingness to use adversarial means and be tough, while keeping the door open to a negotiated settlement.

A second approach is for an individual or agency that normally processes a number of disputes to announce **before** a particular dispute arises, that they will use mediation as a routine step, after un-assisted negotiations, in an institutionalized dispute resolution process. By indicating that these two steps will routinely be used prior to moving to more adversarial means, a party can avoid any appearance of weakness on any single case.

Who Participates in Mediation?

Generally the participants in mediation are people who are well informed about contested issues and have the authority to make a decision. In most cases these will be key individuals or decision makers in an organization. Frequently decision makers may be advised by legal counsel or other technical experts, and on occasion a "side" may be represented by a lawyer or negotiating team.

Mediation is a forum where key decision makers can talk directly with each other, without the encumbrance of having to talk through representatives. Face-to-face talks by decision makers often result in productive exchanges and settlements.

How Should a Mediator be Selected?

There are four major considerations in selecting a mediator: 1) the kinds of process assistance that are needed, 2) the degree of substantive assistance which is desirable, 3) the

mediator's prior experience in cases of similar complexity or content, and 4) the relationship or personal chemistry between the mediator and the parties.

Mediators vary in how directive they are in providing procedural assistance to parties. Some mediators are "orchestrators" in that they make general process suggestions, "chair" meetings and basically back-up competent and skilled negotiators who need a structured forum to negotiate a settlement. Other mediators are "deal makers." They are much more directive regarding the negotiating approaches or procedures parties should use, may control the agendas of the meetings, may do extensive work in caucuses or private meetings between the mediator and each of the parties, and may provide substantive advice.

Parties selecting a mediator should clarify in their own minds and with the third party which kind of procedural assistance is desired.

A mediator's substantive expertise or knowledge may be another consideration in selecting a mediator. Some parties want a mediator with some substantive knowledge of issues in dispute so that he or she can advise them on possible settlement options or packages. A mediator with some knowledge of the issues may also be more able to conduct "reality testing" of proposals that are unreasonable or untenable.

On the other hand, if a mediator has significant substantive knowledge of contested issues, he or she may also have a strong opinion about how the issue should be settled. This knowledge may encourage the third party to lead the parties to his or her preferred settlement rather than facilitate the parties' development of their own solutions. Substantive knowledge and strong opinions on the part of the mediator may also compromise the parties' perception of the mediator's neutrality and thus make the intervenor ineffective in providing future assistance.

Another school of thought is that the mediator does not have to possess specific substantive knowledge of the issues in dispute to be of assistance to the parties. Parties, and intervenors who advocate this approach to mediation argue that the parties themselves have the requisite knowledge to settle the dispute and what is needed from the third party is procedural leadership or relationship building assistance, not specific substantive expertise. The premise to this approach is that the intervenor will learn from the parties any substantive expertise that may be required to settle a case.

Experience is another criteria in the selection of a mediator. It is advisable that the mediator has experience in handling issues of similar complexity as the ones to be negotiated. Parties considering a mediator should investigate the intervenor's track record, range of experiences and references before contracting for services.

Relationship, rapport and "personal chemistry" are rather intangible criteria for the selection of a mediator, but they are often key factors in how effective the intervenor will be. Parties have to trust the intervenor, be able to talk freely with him or her, and believe that the third party is working in good faith to help them develop the best settlement possible, if the third party is to be most effective.

How Can A Party Prepare for Mediation?

Mediation is assisted negotiations. The best way to prepare for mediation is to prepare well for negotiations.

The first step in preparing for mediation is for each party to clearly identify what interests must be addressed or met for a satisfactory agreement to be reached. This means clearly identifying the substantive, procedural and relationship interests for each of the involved parties. Substantive interests are objective needs such as money, performance or time which a party wants to have satisfied. Procedural interest are needs about the way that a dispute is resolved. They may include such needs as efficiency, timeliness, an opportunity to present one's case, or preference for cooperative rather than adversarial proceedings. Relationship or psychological interests are needs related to trust and respect, and expectations for how one is treated in the dispute resolution process itself, or in a future relationship.

Once a party has identified its own interests, it is advisable for him/her to try and identify the needs of the other party or parties who are involved. If others have been explicit about their interests, this will be an easy task. If not, it may require some speculation.

Often a party's interests can be decoded from a position statement, a preferred solution that a party has advocated to meet its needs. By examining a position, it is often possible to identify the underlying interests or needs that the party wants to have satisfied.

In some cases, it may not be possible to discern what another party's interests are. In this case, the mediation meeting may have to be used to discover them.

Once the interests for each of the parties have been identified, it is always advisable to generate some potential settlement options. In some negotiations options may have been publicly announced or put on the table in the form of positions. In other cases, where the parties have not begun negotiating, each will have to generate a range of options which would be acceptable to them. This range of options will be used by the mediator and negotiators to craft an agreement which is mutually acceptable to all parties.

Before entering into mediation, it is always wise for the parties to assess what their best alternative to a negotiated agreement, or "BATNA" is. The best alternative refers to both possible settlement options and alternative procedures. Explicitly understanding what non-negotiated alternatives are available, provides a party with a basis to compare settlement options developed at the table. This comparison will assist a party in deciding when to settle and when to stop negotiating and pursue another means of dispute resolution.

Finally, before beginning mediation, each party should think about what his/her relationship expectations are both during and after the negotiations. Some of the questions which should be considered include: Do the parties want an adversarial relationship or would they prefer a more cooperative one? Will the parties have to work together? Will there be future contacts? What impacts will a win/lose settlement have on the relationship?

If it is important that the parties settle and maintain some kind of amicable relationship, each party should consider what measures need to be taken to "clear the air" and minimize any unnecessary damage to the relationship in the process of resolving the dispute. The negotiators should decide individually or as a team what they can do to create as positive a negotiation climate as possible. This does not mean side-stepping strong emotions, but it does mean thinking about how feelings of anger or frustration can be expressed without further damaging the relationship.

Finally, each party should meet with the mediator, either in pre-mediation information exchange sessions, or at the beginning of the first joint session, to clarify the role of the mediator and to gain a thorough understanding of the mediation process which will be used.

In the mediation session, there are a variety of actions that parties can take which will enhance the possibility of a successful outcome and which will help the mediator work more effectively. Generally mediators make a series of process suggestions, such as behavioral ground rules or ways to approach a particular issue. It is helpful if the parties work with the mediator and do not fight the process. Also mediators may want to meet with each of the parties separately to help develop settlement options, evaluate a proposal or do some reality or feasibility testing with a party. It is helpful if the parties work with the mediator in these sessions to develop realistic options or appraise potential settlements.

What Happens in a Mediation Session?

Mediation sessions usually begin with introductions if the participating parties have never met face-to-face. The mediator will usually outline the issues that have brought the parties to the session and will gain agreement on the purpose of the meeting. Many mediators may also suggest some procedural ground rules such as a non-interruption agreement, clarification of the limits of confidentiality, an agreement on time limits and a commitment from the parties to bargain in good faith. Often a mediator will outline the process for the negotiations including a description of how issues and interests will be identified, the use of caucuses or private meetings, a description of how possible settlement options will be developed and what happens when an agreement is reached (or not reached).

At this point the mediator will usually ask the initiating party to begin with an opening statement that details the issues to be discussed, the interests to be met and possibly a preferred settlement option. The mediator may ask questions during the opening statement to clarify an issue or interest. At the conclusion of the first party's opening statement, the mediator will usually summarize what he or she has heard. It is then the other party's turn to make an opening statement.

With the completion of the opening statements, the mediator will assist the parties to order the issues into a workable agenda. Often the mediator will look for an easy item to start with, one he believes the parties will be able to settle in a fairly brief period of time. An early settlement of at least one issue creates momentum in the negotiations and demonstrates to the parties that agreements can be reached.

The mediator may assist the parties to work through the issues one at a time or may help them to link and trade issues in a package arrangement. Settlement options may be generated by the parties through structured discussion in joint session, or may be developed through conversations with the mediator in caucuses.

How are the Results of the Meeting Documented?

Meeting documentation can be accomplished in several ways. The mediator may take notes and draft a memorandum of understanding, or MOU, that summarizes the results of the meeting. It may detail the agreements and any areas of disagreement which may remain. If appropriate, this document may be referred to each of the parties' legal advisors to be turned into a formal contract or legally binding agreement.

An alternative to the above procedure is for the parties to take their own notes and to agree at the conclusion of the meeting as to who will draft the final settlement document.

In either of these cases, the parties may need or desire a final meeting to sign a formal document. If parties do not believe that there will need to be any final modifications, the final agreement may be circulated by mail for final signatures.

What Does Mediation Cost and Who Pays for the Service?

The cost of mediation services depends on the provider, the complexity of the dispute and the length of the time that parties need negotiation assistance. There are a variety of mediation providers, both non-profit and for profit, which charge a range of fees. Services are billed by the hour, by the day, or may be negotiated for a single set intervention fee.

Mediating a dispute is usually less costly than litigation in that the parties are using the services of only one external party. Generally, the procedure is also less time consuming and resource intensive than litigation. Typically, the cost of mediation services is born by all involved parties. In contract disputes, the fee is usually split between the parties.

How is Confidential Information Handled in Mediation?

In mediation, the parties are free to decide how they will handle the discussion of confidential information. Mediated negotiations are often treated as settlement conferences, with restrictions on subsequent disclosure of information revealed in the mediation conference. Data revealed in mediation, such as confidential information or settlement offers, are generally inadmissable in any subsequent court action.

What is the Relationship of Mediation to Other Alternative Dispute Resolution Procedures?

Mediation is one of a range of alternative dispute resolution procedures. Mediation, and several other procedures—including coaching, training and facilitation—improves the process used by the parties to resolve their differences. Because mediation is voluntary and allows

disputing parties to design and tailor their own agreements, it is often preferred over third party decision-making procedures that result in specific recommendation or binding settlements.

Mediation can be used early in the disputing process, before the parties have attempted un-assisted negotiations, or after the parties have tried to reach an agreement on their own and reached an impasse. Mediation can also be used in combination with a number of other alternative dispute resolution procedures, such as with disputes panels or arbitration. It may also be a component part of other alternative dispute resolution procedures such as the mini-trial.

Are there Different Models of Mediation?

Aside from the deal maker/orchestrator distinction described above, there are several other variations or modifications of the "traditional" mediation process that intervenors or parties have developed to meet particular needs. These include advisory mediation, med-arb, mediation-then arbitration and managerial mediation.

Advisory arbitration—This process is similar to the mediation process described above except that the parties can contract with the mediator to give them an advisory non-binding opinion if they fail to reach a settlement. The parties usually contract for the mediator's opinion at the beginning of the mediation process, but only hear the advice in the event of impasse. This procedure has been highly successful in a variety of types of disputes. In a high percentage of cases, the parties have accepted the mediator's opinion as the basis for settlement. In those disputes where parties have rejected the mediator's opinion and have decided to go to arbitration, the subsequent arbitrator's decision has been identical to the mediator's opinion in a majority of cases. These results have often encouraged parties to accept the mediator's initial recommendation rather than incur the additional costs of arbitration or other adversarial procedures.

Med-arb—Another variation of the mediation process is med-arb. Unlike advisory mediation described above, participants in med-arb agree prior to the beginning of mediation that if they reach an impasse, they will ask the third party who had been mediating the dispute to make a binding decision on the contested issue. This assures that a settlement will be reached, even though it may not be a negotiated one. Strengths of this procedure are the assurance of a settlement and avoidance of time and costs to re-present the case to a third party decision maker. Risks or costs to the procedure are that parties may be reluctant to reveal information about their basic interests or the strengths or weaknesses of their case to a third party who may later be a decision maker. This limits the flexibility of the mediator and limits his or her means of influence. Often if parties believe that a third party will ultimately decide their case, they will not work as hard to achieve a negotiated settlement.

Mediation-then-arbitration—A dispute resolution procedure that combines mediation and arbitration procedures and strengths is mediation-then-arbitration. It assumes that some issues may be mediated while others may require the decision of a third party decision maker. It is usually part of a three-step dispute resolution procedure that includes

unassisted negotiations, mediation and then arbitration. Mediation-then-arbitration avoids some of the weaknesses of med-arb described above in that the mediator and arbitrator are separate people. Parties can reveal to the mediator as much about their interests, or the strengths and weaknesses of their cases, as they choose without fear that the information will be used by the third party at a later time to form an opinion that may not be in their favor. The parties are also assured that they can present their arguments in their most positive light before an independent arbitrator, who has not been privy to confidential or unfavorable information during the mediation process. Naturally, the down-side of this procedure is the potential additional cost of presenting the case twice, once for the mediator and again for the third party decision maker.

Managerial mediation--This application of mediation involves using the process as a management tool for the resolution of internal organizational disputes. In managerial mediation, the mediator may be a manager who has no direct supervisory responsibility for any of the involved parties, or may in fact be their superior. In the later case, the mediator may not be neutral or impartial because he or she may have specific interests that are to be considered in development of a solution to an organizational problem.

In considering whether managerial mediation is the appropriate resolution process for a particular dispute, management should determine that it is in the best interest of the individuals, groups, or the organization for the involved parties to reach a voluntary negotiated settlement rather than resolve the dispute by means of a command decision. If a decision is made to use managerial mediation, the managerial mediator should clearly identify his or her own parameters or organizational constraints which define acceptable settlement options. The managerial mediator should also outline how a decision will be made, and what his or her role will be in the process, if the parties fail to reach a decision on their own. The managerial mediator may then provide procedural assistance to the parties to facilitate their negotiations.

Managerial mediation should never be used if a manager or management is not willing to delegate defined decision-making authority to the involved parties, or if management has already made a decision. Managerial mediation is a participatory management tool that can produce superior decisions and greater commitment on the part of the parties to a negotiated outcome. It should not be used to manipulate or persuade parties to go along with a previously determined decision. If it is used in the latter manner, it will not be effective and may cause additional credibility problems within the organization.

CONCLUSION

Mediation is a very effective means for resolving a wide variety of disputes. The process is highly flexible and can be adapted to meet the needs of particular parties or situations. Corps managers are encouraged to explore the variety of situations and conflicts where

mediation may be of assistance in developing fairer and more creative, efficient and cost effective settlements of disputes.

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REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188

1. AGENCY USE ONLY *(Leave blank)*	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	September 1991	

4. TITLE AND SUBTITLE

Mediation

5. FUNDING NUMBERS

6. AUTHOR(S)

Christopher W. Moore, Ph.D.

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)

CDR Associates
Boulder, Colorado

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)

U.S. Army Corps of Engineers
Office of the Chief Counsel
20 Massachusetts Avenue, NW
Washington, DC 20314-1000

10. SPONSORING / MONITORING AGENCY REPORT NUMBER

(14) IWR Case Study-91-ADR-P-3

11. SUPPLEMENTARY NOTES

12a. DISTRIBUTION / AVAILABILITY STATEMENT

Unclassfied

12b. DISTRIBUTION CODE

Unlimited

13. ABSTRACT *(Maximum 200 words)*

This pamphlet describes mediation, one of a number of alternative dispute resolution (ADR) techniques which the U.S. Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation. The pamphlet describes what the technique is, how it has been used, and provides guidance on how to participate in the mediation process.

14. SUBJECT TERMS

Mediations, practing, initating and participating in mediation, mediation costs, conclusion.

15. NUMBER OF PAGES

25

16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT
Unclassified	Unclassified	Unclassified	Unlimited